

BEFORE THE  
TENNESSEE REGULATORY AUTHORITY

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In the Matter of

Joint Petition for Arbitration of

NEWSOUTH COMMUNICATIONS CORP ,  
NUVOX COMMUNICATIONS, INC.  
KMC TELECOM V, INC., KMC TELECOM  
III LLC, and XSPEDIUS COMMUNICATIONS,  
LLC on Behalf of its Operating  
Subsidiaries XSPEDIUS MANAGEMENT CO.  
SWITCHED SERVICES, LLC and Xspedius  
Management Co of  
CHATTANOOGA, LLC

Docket No. 04-00046

Of an Interconnection Agreement with  
BellSouth Telecommunications, Inc  
Pursuant to Section 252(b) of the  
Communications Act of 1934, as  
Amended

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JOINT REPLY OF PETITIONERS TO BELL SOUTH'S  
REPLY TO PETITIONERS' RESPONSE TO  
BELL SOUTH'S MOTION TO SEVER

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NewSouth Communications Corp ("NewSouth"); NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. ("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched") and Xspedius Management Co of Chattanooga, LLC ("Xspedius Management") (collectively, "Xspedius") (collectively, the "Joint Petitioners" or "CLECs"), by their attorneys and pursuant to Tennessee Regulatory Authority Rule 1220-1-1.06(2), hereby file with the Tennessee Regulatory Authority ("TRA") this Reply to BellSouth Telecommunications, Inc 's ("BellSouth") Reply to Petitioners' Response to BellSouth's Motion to Sever or to Impose Procedural Restrictions In support of this Joint Reply, the Joint Petitioners state as follows

1        BellSouth has attempted to convince the TRA (1) that this case should not proceed as a joint arbitration and, if it does, (2) that petitioners should in an unreasonable manner be denied their right to file testimony in support of the Joint Petition. In the face of the common sense arguments favoring and the sound legal basis provided for a joint arbitration, and despite Joint Petitioners' willingness to compromise in order to address BellSouth's procedural concerns, BellSouth continues (without offering any compromise) to oppose joint arbitration in a "divide and conquer" strategy designed to put Joint Petitioners at a substantive and procedural disadvantage, and to drain their relatively limited resources. BellSouth devotes most of its reply to mischaracterizing the law, the facts and the Joint Petitioners' positions. However, Joint Petitioners emphasize the following facts supporting a joint arbitration proceeding:

- **There is precedent.** The TRA is presently conducting a Joint Arbitration with twenty-six (26) parties: five (5) Commercial Mobile Radio Servers and twenty-one (21) rural carriers; Docket No. 03-00585.
- **Joint negotiations can (and do) legally result in joint arbitrations.** Joint Petitioners participated in joint negotiations with BellSouth from the beginning. The Act contemplates both joint negotiations and their logical result: joint arbitration petitions.<sup>1</sup> There is no rational or legal basis to support BellSouth's request to break this proceeding into four separate and largely redundant ones.
- **One proceeding will be vastly more efficient than four.** Among the efficiencies and benefits that will result from having a single arbitration in lieu of four are: one procedural order; one issues matrix to track; one response to any BellSouth motions; one set of discovery to BellSouth; one response to any objections by BellSouth to such discovery;

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<sup>1</sup> Although BellSouth claims ignorance, Joint Petitioners are aware that joint petitions for arbitration have been accepted, for example, in Texas where they appear to be encouraged by the Public Utility Commission of Texas. Joint Petitioners' companion Joint Petitions have been accepted for filing in all BellSouth states. No state has granted BellSouth's motion to sever. The Alabama Public Service Commission issued an order on March 16, 2004 effectively denying BellSouth's motion to sever. Also on March 16, 2004, the South Carolina Public Service Commission voted to deny BellSouth's motion to sever (no order has been released). Notably, over a dozen states, including several in the southeast, are entertaining arbitration petitions filed by Verizon seeking to join multiple CLECs, regardless of whether they engaged in joint negotiations. Even BellSouth recognizes that it has been a party to consolidated arbitration proceedings (although, according to BellSouth, they somehow don't count as multi-party arbitration proceedings). In sum and as Joint Petitioners previously asserted, multi-party arbitration proceedings are common. Given Joint Petitioners' commitment to have a single position for every issue raised and to only cross-examine BellSouth's witnesses once, this proceeding promises to have far fewer complications and logistical issues than any other multi-party proceeding of which Joint Petitioners are aware.

one hearing; one set of briefs, consolidated joint and company-specific testimony, and one Arbitration Order

- **There are only six issues that would not be repeated if this arbitration were split into four.** BellSouth's assertion that four separate proceedings would be "markedly smaller" ignores the fact that the vast majority of issues – almost 90 of the remaining 95 – would be repeated in multiple separate arbitrations with the same deadline. Tracking four largely redundant sets of 90+ issues would be infinitely more difficult than deciding them once in a single proceeding
- **Joint Petitioners have adopted a single position statement for each and every issue (satisfying the first of BellSouth's three requests for procedural requirements).** BellSouth's assertions about "what [Joint Petitioners] really mean" are simply not true. Joint Petitioners will continue to present a single position on each and every issue.
- **Joint Petitioners have agreed to cross-examine BellSouth's witnesses only once per issue (satisfying the second of BellSouth's three requests for procedural requirements).** Further, Joint Petitioners have proposed several options regarding BellSouth's cross of their witnesses and are willing to present their witnesses on panels, by company, or simply one-at-a-time <sup>2</sup>
- **BellSouth has made no reasonable assertion that it will be prejudiced by a Joint Proceeding.** Joint Petitioners will present consolidated testimony that allows a witness from each petitioner to jointly adopt the same testimony in support of the CLEC position and preserves the right of each company to have a witness capable of testifying with respect to company specific circumstances in support of the common CLEC position (satisfying in large part the third of BellSouth's three requests for procedural requirements) This proposal eliminates any redundancy in testimony (there will be joint testimony on each jointly raised issue), maintains the right of independent entities to provide additional company-specific testimony in support of the same common CLEC positions adopted by the Joint Petitioners, and avoids "hearsay" issues that could result if

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<sup>2</sup> Each petitioner is expected to have from 2 to 3 witnesses and the total number of witnesses is expected to be 10 or less. With respect to how BellSouth should be entitled to cross-examine these witnesses, Joint Petitioners offer a new proposal that (1) accedes to BellSouth's desire to avoid multi-party panels, (2) avoids logistical issues associated with multi-party panels, (3) avoids the movement of witnesses on an issue-by-issue basis, and also avoids holding all witnesses captive through cross on all issues, and (4) is likely to achieve a fair amount of the economy and efficiency that can be gained from a one hearing setting. The proposal is to have witness panels by attachment (General Terms, UNEs, Billing, etc) and by CLEC. It is expected that these panels will have 1-3 witnesses on them. This proposal is consistent with the organization of both the issues matrix and the consolidated testimony that is being developed. Both are organized by attachment and each issue already has been given an attachment specific issue number (G-1, 2-1, etc). The presentation of testimony would start with the General Terms and then move to subsequently numbered attachments. Each CLEC will have a panel of witnesses for the General Terms and each attachment. These panels will be opened to cross by BellSouth one CLEC at a time, with BellSouth completing its cross-examination of each CLEC panel before moving onto the next attachment and the next set of panels. This way, there will continuity of issues and the decision maker will hear all testimony on the subject matter in reasonable proximity.

an employee of one company is unfairly forced to testify on behalf of another company.<sup>3</sup> BellSouth's objections are obstructionist and purely makeweight.

- **Joint Petitioners would be unfairly and substantially prejudiced by grant of BellSouth's Motion.** BellSouth has presented no rational or legal argument in support of separating four CLECs that have presented BellSouth with an efficient means of negotiating with multiple parties and the TRA with an efficient means of arbitrating unresolved issues that arise from such joint negotiations. Moreover, BellSouth's attempt to strip all but one of the petitioners (on any given issue) of the right to sponsor testimony in support of the common CLEC positions set forth in the Joint Petition ignores the law and makes blatantly false statements about Joint Petitioners' commitment to maintain a single position for each and every issue

2. BellSouth has presented the TRA with a false choice: either grant the Motion to Sever or adopt the procedural requirements preferred by BellSouth (including the one that would strip all but one of the petitioners, on any given issue, of the right to sponsor testimony in support of the common CLEC positions set forth in the Joint Petition). However, the TRA clearly has a more logical and reasonable choice: deny BellSouth's Motion to Sever and its alternative request to impose self-serving procedural restrictions, and instead find that (1) the Joint Petitioners may

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<sup>3</sup> To address BellSouth's stated concerns regarding having to read four separate sets of substantially similar, harmonious, complementary and often redundant testimony (something it definitely would have to do, if there were four separate proceedings), Joint Petitioners will file consolidated and integrated Joint Petitioners' Testimony encompassing all testimony on all issues. This document will include joint testimony for each issue jointly raised (approximately 90 issues, at this point) and Xspedius testimony for the six Xspedius-specific issues (which Xspedius and BellSouth actively are working to resolve); it will also include company specific testimony in support of the same common CLEC position where such testimony is needed to convey company-specific circumstances in support of the same common CLEC position. This latter aspect will avoid evidentiary issues (e.g., "hearsay" objections) that could result if one company's witness is forced to convey facts specific to another company (as BellSouth apparently proposes). In all cases, testimony will be clearly marked with the names of the witnesses (and companies) that are sponsoring it. For illustrative purposes, Joint Petitioners offer the following is an example of how the testimony would look for an issue upon which there was joint and company-specific testimony:

**Q.** Is the CLEC position correct?

**A.** Yes, the CLEC position is correct because . . . . [*Sponsored by: M. Johnson (KMC), J. Jennings (NewSouth), H. Russell (NuVox), J. Falvey (Xspedius)*]

**Q.** Are there any company-specific circumstances you would like to convey to demonstrate that the CLEC position is correct?

**A.** Yes, with respect to this issue, it is important to note that KMC raised this issue in the context of a prior dispute with BellSouth and . . . [*Sponsored by: M. Johnson (KMC)*]

Joint Petitioners' proposal will create a composite document that will be easy to read and track, that will alleviate the need for paper shuffling and comparison of four sets of entirely separate testimony; and that will be significantly shorter than such separately filed testimony.

file consolidated joint and company-specific testimony as proposed, (2) Joint Petitioners will cross each BellSouth witness only once per issue; and (3) the Joint Petitioners will continue to have a single CLEC position statement per issue/sub-issue. These measures assure a reasonable and efficient process that will result in no prejudice suffered by any party

WHEREFORE, the Joint Petitioners respectfully request that the TRA dismiss or deny BellSouth's Motion to Sever or to Impose Procedural Restrictions, and grant any other relief as the TRA may deem just and proper

Respectfully submitted,



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#### Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U S Mail, first class postage prepaid, to the following, this 22nd day of March, 2004.

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H. LaDon Baltimore